# Supreme Court of the United States

OCTOBER TERM, 1954

No. 36

UNITED STATES OF AMERICA,
*Appellant,*

*v.*

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L. A. B. AMUSEMENT CORPORATION,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES

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**STATUTE**

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## MISCELLANEOUS

# Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES

### Opinion Below

The opinion of the District Court (R. 18) has been reported at 120 F. Supp. 15.

### Jurisdiction

The judgment of the District Court was entered December 30, 1953 (R. 18). A petition for appeal was filed on February 18, 1954, and allowed on the same day (R. 24-25). The jurisdiction of this Court is invoked under the Act of June 25, 1948, § 17, 15 U. S. C. 29, 62 Stat. 989.

## Question Presented

This appeal presents a question of construction of the Sherman Act, *viz.*, whether the business of the legitimate theatre is within its scope.

More specifically, the question is whether the legitimate theatrical business is "trade or commerce among the several States", as that term was used by Congress in Sections 1 and 2 of the Act. Put into the terminology employed in *Toolson* v. *New York Yankees*, 346 U. S. 356, the question is:

> "Did Congress intend to include the business of the legitimate theatre within the scope of the federal antitrust laws?"

## Statute Involved

The relevant provisions of Sections 1 and 2 of the Sherman Act (15 U. S. C. 1, 2) are as follows:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal: * * *.
>
> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor, * * *."

## Statement

The complaint, charging violations of Sections 1 and 2 of the Sherman Act, was filed February 21, 1950. The de-

fendants named were (a) the brothers Lee and Jacob J. Shubert and Select Theatres Corporation (Select), of which they owned a majority of the capital stock; (b) Marcus Heiman and a corporation wholly owned by him, L. A. B. Amusement Corporation; and (c) United Booking Office, Incorporated (UBO) of which Select owned 50% and Marcus Heiman owned 50% of the capital stock.*

The allegations of the complaint are summarized adequately at pages 5 to 11 of the Government's brief. We have only the following to add:

Because the complaint is modeled after those in the various motion picture antitrust cases, it analyzes the legitimate theatre business in terms akin to the "production, distribution and exhibition" branches of the motion picture industry, by dividing the legitimate theatre business into three parts—production, booking and presentation. The result is a somewhat artificial and not entirely realistic description of how the business is conducted.

For "presentation" is not a function of the theatre owner and, in that respect, is unlike "exhibition" in the motion picture industry, where the theatre operator—and not the producer of the picture—puts on the show. Production and presentation in the legitimate theatre are in fact one function, which is performed by the producer who assembles and trains the cast and presents the play to the public. The other principal—and correlative—function is the operation of pieces of real estate, *i.e.*, theatres, where the plays may be performed.

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*Since the filing of the complaint, Lee Shubert has died and L. A. B. Amusement Corporation has been dissolved and its assets and business vested in Marcus Heiman personally. Otherwise, the interests of the several appellees are as stated in the complaint. Lee Shubert's executors have not been substituted as parties.

Nor is "booking" closely akin to "distribution" in the motion picture business, where the distributor maintains the inventory of films and "sells" and delivers them to the theatres, which have no contractual relations with the producer. Booking, though a difficult and important operation, is essentially the renting of theatres to play producers. It is a service given to local, intrastate businesses, functionally similar to the renting of rooms by a central agency of a chain of hotels, each of which is a local operation, not engaged in interstate trade or commerce.

## Proceedings Below

On November 24, 1953, in reliance on *Toolson* v. *New York Yankees*, 346 U. S. 356, appellees moved to dismiss the complaint on the grounds (a) that the Court did not have jurisdiction of the subject matter of the action and (b) that the complaint did not state a claim upon which relief could be granted (R. 17).

The District Court (Judge Knox) granted the motion and filed the following opinion (R. 18):

> "In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees, et al.*, decided by the Supreme Court on November 9, 1953.
>
> "Upon the authority of these adjudications the complaint in the above-entitled action will be dismissed."

## Summary of Argument

POINT I—Prior decisions clearly establish that the Sherman Act is not applicable to the theatrical business.

POINT II—The prior decisions should be followed on the principle of *stare decisis*.

## ARGUMENT

### POINT I

### PRIOR DECISIONS CLEARLY ESTABLISH THAT THE SHERMAN ACT IS NOT APPLICABLE TO THE THEATRICAL BUSINESS.

This Court in the *Toolson* case established the *Federal Baseball* case* as the law in 1953 by accepting it as a binding precedent, "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws" (346 U. S. at 357).

#### *The Federal Baseball Case*

This Court in the *Federal Baseball* case, in determining that Congress had not intended the Sherman Act to apply to baseball, did not rest its conclusion upon the legislative history of that Act or any other direct evidence of what Congress had or had not intended. It rested its conclusion upon the common understanding of the words "trade or commerce among the several States". It said that "trade or commerce", as Congress had used the words in the

**Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200.

Sherman Act, did not include "personal effort, not related to production"; that the giving of local exhibitions for public entertainment was not an "interstate" matter; and that "the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business" (259 U. S. at 208-09).

The *Federal Baseball* case recognized that interstate activities were involved in the baseball business. Not only did the teams with their paraphernalia have to cross state lines, but it was necessary, as Mr. Justice Holmes said, to "arrange" for their doing so; and such arrangements, of course, involved the use of the mails and other media of communication, the making of interstate contracts and the other interstate activities which the Government has alleged in its complaint in the present case.

The "interstate commerce" allegations of the present complaint are summarized in par. 49 (R. 12); and all the interstate activities alleged are equally present in baseball:

> "In the course of producing, booking and presenting legitimate attractions [putting on exhibitions of baseball], there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals [practice], the transportation of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions [baseball teams] are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

Thus the baseball business and the theatrical business are indistinguishable in their interstate commerce aspects. The interstate activities* are incidental, in that they are not ends in themselves—the object and end being the performances by living persons for the entertainment of other persons—but are made necessary for the most part by the fact that the places of exhibition are located in different States. The necessity of using interstate transportation and communication, according to the *Federal Baseball* case, "is not enough to change the character of the business" (259 U. S. at 209). "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place" (id.).

The principle was stated by Mr. Justice Holmes in general terms, and was in no wise confined to baseball. He used the following analogies to support his argument (id.):

> "To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State."

Other analogies found in the lower court's opinion, which this Court said "went to the root of the case", and which it found to be "correct", were of college football games, grand opera and the theatre (269 Fed. at 685-6).

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*One important interstate activity involved in baseball—not merely as an incident to the giving of local exhibitions, but as an independent source of revenue—is not found in the theatrical business: Performances of plays or musical shows in legitimate theatres are not broadcast over the radio or television.

*Earlier Authorities*

The decision of the lower court in the *Federal Baseball* case was not novel at the time when it was rendered, but was supported by earlier authorities which had dealt with the problem of whether the legitimate theatre, grand opera, vaudeville and baseball constituted "trade" or "commerce":

*In re Oriental Society, Bankrupt*, 104 Fed. 975 (E. D. Pa. 1900)—legitimate theatre.

*People* v. *Klaw*, 55 Misc. 72 (N. Y. Gen. Sess. N. Y. Co. 1907)—vaudeville.

*American League Baseball Club* v. *Chase*, 86 Misc. 441 (Sup. Ct. Erie Co. 1914)—baseball.

*Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691 (1st Dept. 1914)—grand opera.

*In re Oriental Society, Bankrupt, supra*, turned on whether a theatrical company was engaged in "trading, * * * or mercantile pursuits", within the meaning of the Bankruptcy Act of 1898. It was argued that the producer had to buy scenery which, when the play had run its course, he would sell; but it was pointed out that the producer was not in the business of buying and selling scenery; and that therefore the purchase, interstate transportation and sale of the scenery was a mere incident to his proper business, insufficient to change its character.

The judges in the early cases, who were closer than we are today to the commonly accepted meaning of "trade or commerce" when the Sherman Act was passed, and during the early days of its enforcement, regarded such activity as the giving of theatrical performances as being "as far

removed as possible from the commonly accepted meaning of trade and commerce". See *Metropolitan Opera Co. v. Hammerstein, supra,* at 695.

*The Marienelli Case*

Prior to *Federal Baseball* there had been one antitrust case holding that the Sherman Act did apply to the theatrical business—the decision of Judge Learned Hand in *Marienelli v. United Booking Offices,* 227 Fed. 165 (S. D. N. Y. 1914). Plaintiff was a booking agent for vaudeville acts, and the principal defendants were the two large vaudeville circuits (Keith and Orpheum) and their booking agencies. The charge was that the defendants had combined and conspired to monopolize all vaudeville booking and to exclude plaintiff from it, and that they had blacklisted him and destroyed his business.

The business of plaintiff and the defendant booking agencies was to arrange interstate tours for vaudeville troupes and individual performers. Judge Hand, in overruling a demurrer to the complaint, analyzed the problem in terms of "direct" and "indirect" effects on interstate commerce; he held that the contracts made by the booking agents were performed as much by interstate transportation of the vaudeville actors and their paraphernalia as by the giving of performances; and he concluded that the alleged conspiracy was a "direct", rather than an "indirect", restraint of interstate commerce. Judge Hand did not decide the question that Mr. Justice Holmes later found determinative of the *Federal Baseball* case—whether the giving of local performances was "trade or commerce"; he treated them as an intrastate phase of the business.

The reasoning of the *Marienelli* case was urged on the courts in the *Federal Baseball* case, but it was not accepted; and the case has never been followed.*

*Hart* v. *Keith Exchange* (*262 U. S. 271*)

The Government's position is that the *Toolson* case applies exclusively to the baseball business and has no application to any other business, however similar it may be to baseball in its interstate commerce aspects; that previous cases (and in particular the *Hart* case) did not establish an exemption of the theatrical business from the Sherman Act; and that therefore this Court should now examine the problem without reference to the principle of *stare decisis*.

As the Government reads this Court's decision in *Hart* v. *Keith Exchange*, not only does it *not* establish the exemption of the theatrical business from the Sherman Act; it establishes just the contrary—that the legitimate theatre is within the Act.

The point is asserted repeatedly in the Government's brief. At page 11 it is said that the *Hart* case "established that the theatrical business, in its interstate aspects, is subject to the [Sherman] Act"; at page 17 that, at least since the decision in the *Hart* case, "it has been established * * * that the theatrical business, in its interstate aspects, is subject to the federal antitrust laws". At page 22, with reference to the decision of the Court of

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*We do not know what the Government means in its footnote on page 20, to the effect that this Court's decision in *Hart* v. *Keith Exchange*, "was perhaps foreshadowed" by *Marienelli*. As we show in the discussion which follows, the *Hart* case was decided by this Court on a basis that rejected not only the reasoning of the *Marienelli* case but also its holding that the ordinary activities of vaudeville booking agents—whether or not they were "incidental" to the local business—amounted to interstate commerce.

Appeals* after trial of the *Hart* case, which this Court refused to review by certiorari—and which held that the theatrical business was not trade or commerce within the Sherman Act, because all the interstate activities found to be present were "incidental"—it is said that "this Court had held the contrary in the prior appeal in the very case."

Then at page 27 we are charged with asking the Court "to hold now, for the first time since the Sherman Act was enacted in 1890, that the Act does not apply to [the theatrical] business"; and then it is said: "The only pertinent decision by this Court—the *Hart* case in 1923—indicated that the theatrical business in its interstate aspects was not immune from the Act." Finally, at page 35, it is said that *Federal Baseball*—insofar as it reflects the view that the Sherman Act is not applicable to businesses involving "exhibition" or "personal effort"—had been "undermined" in the subsequent cases, including the *Hart* case.

At no point in the brief, however, does the Government attempt to analyze the *Hart* decision in the light of the facts alleged, the arguments presented to the Court, and the meaning of Mr. Justice Holmes's opinion in the context of the whole body of relevant decisions.

Such an analysis shows that the arguments of the Government are erroneous and that the *Hart* case, far from being an authority in the Government's favor, was a reaffirmation of the *Federal Baseball* case and a clear adjudication of its applicability to the theatrical industry.**

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*12 F. 2d 341.

**The Government in its brief employs a curiously distorted form of expression with reference to the argument that we made in our Motion to Affirm, pp. 8-11, with respect to the later proceedings and the denial of certiorari in the *Hart* case. They attribute to us the argument "that the subsequent history of the *Hart* litigation vitiates its value as a precedent" (Gov. br. p. 21). We did not so argue, because we regard the original *Hart* decision as a clear precedent in our favor, and we consider that it was fortified by the subsequent proceedings.

When the *Hart* case first came on for trial in the District Court, before Judge Mack, the defendants moved to dismiss the complaint on the authority of the *Federal Baseball* case, while plaintiff urged that Judge Learned Hand's decision in *Marienelli* was correct and should be followed, since the conspiracy alleged in *Hart* was substantially identical with that alleged in *Marienelli*, and involved the same phase of the vaudeville branch of the theatre business. In both cases the plaintiffs were booking agents and the defendants were the Keith and Orpheum Circuits and their booking agencies.

Judge Mack granted the motion to dismiss, citing *Federal Baseball* as having overruled *Marienelli*:*

> "If the criterion laid down by Judge Hand in his decision in the *Marienelli* case had been adopted by the Supreme Court, this case would be clear, because it falls clearly within the *Marienelli* case. In my judgment, however, the Supreme Court in the baseball case has not adopted that criterion, but it adopted one which practically is that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce; and in my judgment, that is so neither in the case of the defendants nor in the case of the plaintiff."

On his appeal to this Court, plaintiff Hart again urged the *Marienelli* case, and took the broad position that the theatrical industry must be distinguished from baseball because a vaudeville act was something that could be bought, sold and traded in. As it was put in the appellant Hart's brief (p. 13):

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*Printed at p. 27 of the brief for Orpheum Circuit, Inc., et al., before the Court of Appeals in *Hart* v. *Keith Exchange*, (__ F. 2d 341). An error in spelling "Marienelli" has been corrected.

> "For, a vaudeville act or production, as defined in this complaint, is essentially a *product* of human effort; it is a commodity in which the property rights of the owners are recognized and protected by law. It is a commodity that is bought and sold, licensed and rented for hire; it is an element of economic wealth; it is property."

Upon that premise appellant Hart argued, following the reasoning of *Marienelli*, that the conspiracy which excluded him from the booking business—which allegedly prevented him from sending his clients on interstate tours to play in vaudeville houses—was a "direct" interference with interstate commerce.

In writing the opinion for this Court, Mr. Justice Holmes ignored the issue thus tendered, and framed an issue for the Court in terms of a much more restricted argument derived from appellant's brief, in which various types of vaudeville acts were described in terms of whether they involved much or little transportation of paraphernalia, and whether the actors or the paraphernalia were more important. At one end of the scale was the monologuist, who had to carry only the clothes in which he appeared on the stage; at the other end was the "Saw-the-Woman-in-Half" act—an arrangement of apparatus in which mirrors produced the illusion that the lady was being bisected—where only the paraphernalia had to be moved across State lines, the lady in the box and the man with the saw being available locally.*

*Other examples of what Mr. Justice Holmes may have had in mind when he referred to cases where "in the transportation of vaudeville acts the apparatus sometimes is more important than the performers" are "Old Ninety and Nine", which simply displayed a locomotive, and "The Toonerville Trolley", which featured a trolley car. Brief for petitioner *Hart* in 262 U. S. 271.

From the factual distinctions thus made, Mr. Justice Holmes formulated the issue in the following terms (*202* U. S. at *272-73*; emphasis ours):

> "* * * It is alleged that a part of the defendants' business is making contracts that call on performers to travel between the States and from abroad and in connection therewith require the transportation of large quantities of scenery, costumes and animals. Some or many of these contracts are for the transportation of vaudeville acts, including performers, scenery, music, costumes and whatever constitutes the act, so that it is said that there is a constant stream of this so-called commerce from State to State. The defendants contend and the judge below was of opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by *Federal Base Ball Club* v. *National League*, 259 U. S. 200. On the other hand it is argued that in the transportation of vaudeville acts *the apparatus sometimes is more important than the performers* and that the defendants' conduct is within the statute *to that extent* at least."

Mr. Justice Holmes apparently did not consider that the argument based on *Marienelli* required attention, perhaps because the same argument had been so clearly made and rejected in *Federal Baseball* the year before. In any event, he did ignore it, and the principle that he laid down for the lower court to apply on the remand was simply that "non-incidental" activities in interstate commerce may bring persons, not otherwise engaged in "trade or commerce", into conflict with the Sherman Act.

In substance, Mr. Justice Holmes informed the trial court that the jurisdictional question should be decided on the evidence and, to use his words, that if anything could "be extracted from this bill that falls under the act of Congress", it should be "considered independently" (id. at 274).

Thus the Court's reversal of Judge Mack's decision was placed upon a ground that was very narrow—first, because the only jurisdictional inquiry that the trial court on remand was required to make was whether there were interstate activities in the business that passed the bounds of the "incidental", so that they had to be considered "independently"; second, because—faced with a 55-page complaint of "superfluous length" (id. at 272), and replete with all sorts of allegations about interstate matters—the Court's ultimate reason for the reversal was "that we are not prepared to say that *nothing can be extracted* from this bill that falls under the act of Congress, or *at least* that the claim is wholly *frivolous*" (262 U. S. at 274; emphasis ours).

*Hart* v. *Keith* did not qualify the *Federal Baseball* case in any way, nor did it impair its authority on the propositions (1) that the giving of local performances by living players for public entertainment is not "trade or commerce" under the Sherman Act and (2) that interstate commerce which is merely incidental to the local business—which occurs only because the places of entertainment are in different States—does not bring the business under the Sherman Act. *Hart* v. *Keith* merely added another proposition of law to those two, namely, (3) that where the interstate activities of a business like the theatre business go beyond the "incidental", they must be judged "independently" of the main business, and they may constitute interstate trade or commerce though the principal business does not. The third

proposition is necessarily implicit in the second. For if the interstate activities of a business like baseball or the theatre are held to be outside the Sherman Act *because* they are "incidental", then it follows that, when they cease to be incidental, they cease to be outside the Act.

A good example of the "non-incidental" type of activity is found in the recent case of *United States* v. *National Football League,* 116 F. Supp. 319 (E. D. Pa. 1953), in which the Government charged that the National Football League and its constituent teams were violating the Sherman Act—not in conducting their business of presenting football games, but in imposing restraints on broadcasting of the games by radio and television. The District Court did just what Mr. Justice Holmes had indicated in *Hart*—it "considered independently" the question of whether the restrictions on broadcasting—a "non-incidental activity"—violated the Sherman Act. It held that unreasonable restrictions violated the Act whether or not the *Toolson* case applied to professional football.

To put the point of the *Hart* case in another way: When this Court limited the jurisdictional issue on the remand to a determination of whether the theatrical business involved interstate activities that went beyond the "incidental", it necessarily held that "incidental" activities would not bring the business within the Sherman Act *because* the giving of local theatrical performances was not "trade or commerce".*

Thus *Hart* v. *Keith Exchange*—instead of establishing, as the Government asserts, that the theatrical business is

*In the present case, the Government has not charged that the defendants engaged in any interstate activity that was not incidental to the business of giving performances of plays in theatres in various cities or was not attributable to the fact that the cities in which legitimate theatrical performances are given are located in different States.

within the Sherman Act with respect to its ordinary activities—established just the opposite.

This Court's decision in *Hart* was so understood by the first judge who was called upon to apply it—Judge A. N. Hand, to whom the case was assigned for trial after remand to the District Court. After hearing the plaintiff's testimony, he granted defendants' motion to dismiss with the following statement (Record in 12 F. 2d 341, fols. 3222-24):

> "I will dismiss on the ground that the Interstate Commerce shown is incidental to the primary thing, that of entertainment. I think the Baseball case on this record requires that. Mr. Justice Holmes writing in the Supreme Court in this case (Hart v. Keith) decided nothing more than that upon the complaint with its extensive allegations relating to interstate commerce the trial court ought to have gone into the facts, and not have dismissed on the pleadings.
>
> "The decision of the Supreme Court in the Binderup vs. Pathe Exchange (263 U. S. 291) case is based, in my opinion, upon the fact that the subject there was the shipment of motion pictures, and the decision of the Supreme Court in the case of Rankin Co. vs. Billposters Co. (260 U. S. 501) is likewise based upon the ground that the shipment of posters was there a primary rather than an incidental subject of the action."

The Court of Appeals affirmed. It stated that the issue was whether the rule of *Federal Baseball* applied, and said that depended on whether, as the defendants argued, the transportation of the paraphernalia of vaudeville in interstate commerce was incidental to the business of giving local performances of vaudeville acts, or whether the alleged

conspiracy was in fact "an interference with interstate movement of stage properties or paraphernalia used in the vaudeville theatrical business" (12 F. 2d at 344). The Court decided that the latter was not the fact—that all interstate activities shown by the evidence were "incidental".*

This Court denied certiorari. We said in our Motion to Affirm that we did not draw the prohibited inference from the denial of certiorari, but pointed out that the necessary effect of that denial was to permit the doctrine of the *Federal Baseball* case to become the law in the theatrical business—at least in the Circuit in which the major activities of that business are conducted. *Cf. Brown* v. *Allen*, 344 U. S. 443, 543 (Jackson, *J.*, dissenting).

The subsequent cases may be reviewed briefly:

Except for *Ring* v. *Spina*, 148 F. 2d 647 (2d Cir. 1945), and *Gardella* v. *Chandler*, 172 F. 2d 402 (2d Cir. 1949), all of them—involving baseball, Chautauqua, the theatre and grand opera—followed the doctrine of the *Federal Baseball* case.

The baseball cases are:

*Gardella* v. *Chandler*, 79 F. Supp. 260 (S. D. N. Y. 1948), reversed in case cited *supra;* denial of motion for injunction *pendente lite* affirmed, 174 F. 2d 919 (2d Cir. 1949), upon authority of *Martin* case, next cited;

*Martin* v. *National League Baseball Club*, 174 F. 2d 917 (2d Cir. 1949), affirming *Martin* v. *Chandler*, 1948-1949

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*The Court also expressed its views on the merits, unnecessarily in view of its decision on jurisdiction.

CCH Trade Cases par. 62,397 (S. D. N. Y. 1949) (not reported officially);

*Kowalski* v. *Chandler*, 202 F. 2d 413 (6th Cir. 1953), affirming an unreported District Court decision (S. D. Ohio 1953);*

*Corbett* v. *Chandler*, 202 F. 2d 428 (6th Cir. 1953), affirming an unreported District Court decision (S. D. Ohio 1953);*

*Toolson* v. *New York Yankees*, 101 F. Supp. 93, affirmed *per curiam*, 200 F. 2d 198, affirmed *per curiam* 346 U. S. 356.

The Chautauqua case is *Neugen* v. *Associated Chautauqua Co.*, 70 F. 2d 605 (10th Cir. 1934).

The case involving the legitimate theatre is *Ring* v. *Spina* in the District Court (unreported),** reversed in *Ring* v. *Spina*, *supra*.

The case involving grand opera is *Conley* v. *San Carlo Opera Company*, 163 F. 2d 310 (2d Cir. 1947), affirming 72 F. Supp. 825 (S. D. N. Y.).

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*Affirmed together with *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356.

**The applicable portion of the opinion of Judge Caffey in the District Court, printed in the transcript of record in *Ring* v. *Spina* (148 F. 2d 647), is as follows (pp. 103-4):

> "It seems to me it has been settled by the Circuit Court of Appeals for the Second Circuit, whose decisions bind me, that none of the transactions alleged in the complaint with respect to the play involved was an act of interstate commerce. I conceive of no ground for distinguishing the case (*Hart* v. *B. F. Keith Vaudeville Exchange*, 12 Fed. (2) 341, 344, cer. denied 273 U. S. 703, 704. See also *Federal Club* v. *National League*, 259 U. S. 200, 208-9, and *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691, 694-5, affd. 221 N. Y. 507). If this be true, then it seems to me the plaintiff is not entitled to recover."

In the *Gardella* and *Ring* cases in the Circuit Court of Appeals, there were opinions questioning the authority of the *Federal Baseball* case as a precedent.

The variant views of Judges Learned Hand, Chase and Frank in the *Gardella* case were before the Court in *Toolson,* and it seems unnecessary to comment on them in this brief. It may be sufficient to point out that all three judges agreed that *Federal Baseball* was a binding precedent if not distinguishable—as Judge Frank thought it was, and Judge Learned Hand thought it might be, by reason of the part played by radio and television broadcasting in the baseball business. See *Martin* v. *National League Baseball Club, supra* at 918, for a summary by Judge Hand of the three points of view.

## *Ring* v. *Spina*

*Ring* v. *Spina,* which arose out of a dispute over rights in a play for the legitimate theatre, was a treble damage suit under the Sherman Act, based on alleged invalidity of the Minimum Basic Agreement of the Dramatists' Guild.

The District Court (Judge Caffey) denied a motion for an injunction pending trial, on the ground that *Hart* v. *Keith Exchange* (12 F. 2d 341) required him to hold that none of the transactions alleged in the complaint was "an act of interstate commerce". The court also cited *Federal Baseball* and *Metropolitan Opera Co.* v. *Hammerstein, supra,* in support of that conclusion.

The Court of Appeals (Judges Evans and Clark sitting) reversed, holding in substance that the theatrical business

was in fact in interstate commerce and under the Sherman Act.

Judge Clark wrote the opinion, expressing doubt that the *Hart* and the *Federal Baseball* cases were still good law, but interpreting them as holding only "that contracts for the personal services for exhibition purposes of vaudeville and baseball artists were not in interstate trade or commerce" (148 F. 2d at 650); and he went on to distinguish between a simple contract of that kind and the whole business of producing a musical comedy. His analysis in that respect was quite contrary to the reasoning of the *Hart* cases and the *Federal Baseball* case, because none of the opinions in those cases raised or decided the question of whether players' contracts were in interstate commerce, as distinguished from the businesses themselves being "trade or commerce".

Whatever authority *Ring* v. *Spina* might have had, before the *Toolson* case, was considerably weakened when it came up to the Court of Appeals again after trial. *Ring* v. *Authors' League of America*, 186 F. 2d 637. Without going into detail, it may be sufficient to say that the posture of the case was such that it might have been a precedent for the Dramatists' Guild's being held to be a combination in restraint of trade. Judge Learned Hand, in an opinion for the unanimous court, questioned whether the court "should decide issues in which the plaintiff has only the most shadowy interests", ordered the judgment modified to exclude a provision that was a measure of antitrust relief, and said (p. 643):

> "* * * However, we hasten to add that we leave open all legal questions which such issues involve;

> we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise."

As we read Judge Hand's words, they mean that *King* v. *Spina* was not to be understood as deciding anything, one way or the other, on the antitrust issues that had been discussed in the opinion.*

The special characteristics of the theatrical business—how it operates, who in the business performs this function or that, what use it makes of the mails, of interstate transportation and of other instrumentalities of "interstate commerce"—have been subjects of examination by the courts from time to time over a long period of years.

Over the years the decisions applicable to baseball and those applicable to the theatre have been inextricably interwoven. The Court of Appeals in its decision in the *Federal Baseball* case relied in part on the earlier cases involving the theatre; and when *Federal Baseball* was argued before this Court, Mr. George Wharton Pepper, attorney for the baseball interests, relied heavily on the analogy of the theatre—citing not only the theatre cases but also a series of rulings of the Attorney General, to the effect that the

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*A mistake in the Government's brief creates the erroneous impression that Judge Clark's decision in *King* v. *Spina* (148 F. 2d 647) was taken up to this Court on a petition for certiorari, and that certiorari was denied. Actually, the decision of Judges Evans and Clark in 148 F. 2d was the only one of three Court of Appeals decisions in the *King* litigation that was not taken up on a petition for certiorari. The citations for the two that were taken up are 166 F. 2d 546 (involving the right to a trial by jury), *cert. den.* 335 U. S. 813, and 186 F. 2d 637 (referred to in the text, opinion by L. Hand, C. J.), *cert. den.* 341 U. S. 935.

theatrical business was not within the Sherman Act.* In the *Hart* case, of course, *Federal Baseball* was the main reliance of the defendants and was the authority upon which the Court of Appeals, having found only "incidental" interstate commerce to be present on the facts, decided the case in their favor; and in the *Toolson* case the respondents (Brief, pp. 37, 39 and 40), cited and relied in part on the theatre cases.

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*Three separate rulings of the Department of Justice, to the effect that the theatrical business was not within the Sherman Act, were made by three Attorneys General in 1911, 1917 and 1920. The last was made in response to a request by the Federal Trade Commission as to whether it had jurisdiction over a proceeding before it (F. T. C. Docket No. 128-1918) in which the Vaudeville Managers' Protective Association was charged with violations of the antitrust laws. A copy of that ruling was submitted to the District Court in this case and its authenticity was admitted by the Government. It reads as follows:

April 2nd, 1920.

Hon. Victor Murdock,
Chairman, Federal Trade Commission,
Washington, D. C.

Sir:

Receipt is acknowledged of your favor of March 27th transmitting your records in the case of the *Federal Trade Commission* v. *The Vaudeville Managers' Protective Association, et al.*

This subject has previously been considered by the Department, and my predecessors on January 28, 1911, and again on March 24, 1917, took the view that the business of presenting and executing theatrical entertainment is not commerce within the constitutional sense, and that, therefore, such a combination as that involved in this case does not fall within the Acts of Congress prohibiting combinations in restraint of interstate commerce.

I see no reason to depart from the views of my predecessors, and, therefore, I am returning herewith your records.

Respectfully,

(Signed) C. B. Ames,
Assistant to the Attorney General.

Enclosure 16972.

Throughout the whole course of decision, no Court has yet found a distinction that would place the one business outside the Sherman Act and the other within it. The reasoning of Mr. Justice Holmes in *Hart* v. *Keith Exchange* would have been equally applicable to a case involving baseball, if "non-incidental" interstate commerce had been alleged. And neither in the *Marienelli* case nor in the opinion of Judge Clark in *Ring* v. *Spina* is there any suggestion of a basis of distinction between baseball and the theatre. The reasoning of *Marienelli* would have brought baseball under the Sherman Act; and that of Judge Clark would have destroyed *Federal Baseball* as a precedent equally with *Hart* v. *Keith*.

It can be said of *Federal Baseball*, the *Toolson* case and the two decisions in *Hart* v. *Keith Exchange*—as this Court said of the *Schwimmer*, *Macintosh* and *Bland* cases* in its opinion in *Girouard* v. *United States*, 328 U. S. 61, 63—that:

> "* * * the principle emerging from the three cases obliterates any factual distinction among them. * * * they stand for the same general rule * * *"

The Government in its brief seeks to escape the force of the authorities by citing cases which are similar to the theatrical business in respect of the type of work that is done in preparing what it calls the "product", specifically, book publishing (pp. 36-37) and motion pictures (pp. 32-33). But such cases are no more in point here than they were in the *Toolson* case. In book publishing, the end re-

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*United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; and *United States* v. *Bland*, 283 U. S. 636.

sult is a physical thing that is bought and sold in interstate commerce like any other merchandise. No one would suggest that the fact that the product is sold at "local" bookstores is significant; most consumers' goods that move in interstate commerce are sold at local retail stores.

The Government's argument misses the point that, just as baseball is a sport, so the theatre is an art—a form of human expression, a means of communicating thought and emotion from living human beings to other living human beings. Its products are not embodied in physical things that are bought and sold in trade or commerce. They are intangible and evanescent, unique and individual. The play —the "independent product", as the Government calls it (Br. p. 33)—does not exist until the curtain rises and living men and women commence to act their parts; it ceases to exist when the curtain goes down on the last act.

In spite of its close relation to the theatre, the motion picture industry is different from it in the most significant particular—the fact that the motion picture film is an article of trade, not in any metaphoric sense, but in the real sense that it is an end product of a manufacturing process, which is "sold" and physically delivered to the customers from whom the producer derives his revenue—the theatres. A motion picture is an artificially created series of photographs of scenes and actions. Each of them has been rehearsed, acted and re-acted, photographed and re-photographed, then put together physically into a connected whole, then edited and cut, added to by retakes and finally made into the finished thing. The result is a stereotype; it may be shown from the film at any given time, in identical form, in as many places throughout the country as there are copies of the film. It is an inanimate

*thing*—a reel of photographic film in a metal box—which moves into interstate commerce like any other manufactured product.

But a play in the legitimate theatre, like a baseball game, is an experience of living people.

## POINT II

### THE PRIOR DECISIONS SHOULD BE FOLLOWED ON THE PRINCIPLE OF *STARE DECISIS*.

This Court, not only in the *Toolson* case but also in *Federal Baseball* and *Hart* v. *Keith Exchange*, rested its decisions on a construction of the Sherman Act. The power of Congress under the Commerce Clause was not in question; and in *Toolson* the Court's reasoning assumed that Congress, if it chose to do so, could bring the baseball business under the Act. The same assumption was made in the presentation of this case before the District Court and is made here.

Thus the special considerations that affect the application of *stare decisis* in Constitutional cases are not germane.* All that is involved is whether a settled construction of a statute shall be adhered to.

Since *stare decisis* is the very cornerstone of our Anglo-American system of justice, the cases that apply the principle are, of course, infinitely more frequent than those that discuss it; and when discussion occurs, it is in cases where the wisdom of following an established rule has been questioned, and the discussion is generally in specific terms.

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*See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407-8, Brandeis, J., dissenting.

But the principle that runs through the decisions seems to be this—that a settled construction of a statute will be followed unless there are strong reasons for deviating from it. As Mr. Justice Cardozo put it, "Adherence to precedent should be the rule and not the exception."*

In the words of Mr. Justice Brandeis, dissenting in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406:

> "*Stare decisis* is usually the wisest judicial policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank* v. *Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern providing correction can be had by legislation."

In a case like this, where there are precedents of long standing, it is better to leave the remedy to the legislature. *Cleveland* v. *United States*, 329 U. S. 14; *Screws* v. *United States*, 325 U. S. 91; and see *Commissioner* v. *Estate of Church*, 335 U. S. 632, 676-7, per Frankfurter, *J.*

This case does not relate to one of those remote corners of the law, which Congress might be likely to overlook because of its pre-occupation with other areas; it has to do with the applicability of an important federal statute to a business that is constantly in the public eye—a business to whose activities the newspapers and magazines of the country devote constant and considerable attention. If there are evils to be remedied, they are not likely to escape public notice or Congressional correction. "When the evil is defined and generally recognized", said Chief Justice Stone,**

*The Nature of the Judicial Process, p. 149.

**"*The Common Law in the United States*, 50 Harv. L. Rev. 4, 9 (1936).

"legislatures have not been slow to effect reforms which courts have been unwilling or have not felt free to make * * *."

This case is a stronger one for the application of *stare decisis* than was *Toolson*. For *Toolson* raised only the question of whether to follow a precedent or overrule it. It was the usual case where the wisdom of an established statutory construction is called into question, and the Court must balance the considerations that might make a change in the law desirable against the considerations of uniformity and stability which are at the root of the *stare decisis* principle.

Those are the considerations that this case would have involved if *Toolson* had not been decided. But the *Toolson* case applied the *stare decisis* rule upon facts which in their legal significance, under all the authorities, are indistinguishable from those here present; and so this case presents a situation in which there are two grounds for application of the doctrine, (1) the course of decision which gave the statute its interpretation and (2) the prior holding that that interpretation must be adherred to on the *stare decisis* principle.

It is submitted that the *Toolson* case not only supports the application of *stare decisis* here, but compels it. For if the doctrine is not applied, there will be not only different rules of law for baseball and the theatre under the Sherman Act, but there will be different rules of *stare decisis* for the two types of business.

### *The Government's Three Distinctions*

The Government argues that the *Toolson* case was an "exceptional" application of the doctrine of *stare decisis*,

based upon the presence of "a combination of three principal factors, peculiar to the situation of baseball, which justified the decision"; and it says that none of the factors, which are stated as follows, is present in this case (Gov. Br. p. 17):

(1) Prior decision by this Court as to the specific business involved;

(2) Subsequent Congressional consideration; and

(3) Reliance on this Court's prior decision.

We submit that under none of the three headings has the Government shown any significant difference between the *Toolson* case and the present one.

*Prior Decision of this Court as to the Specific Business*

*Stare decisis* is not a rule that can be applied industry by industry or case by case. It is not limited, like *res judicata*, to the facts of particular cases. It is a doctrine of adherence to legal principles. The fact that the present case involves a different business from the *Federal Baseball* case cannot be of significance unless the *determinative facts* in the two cases are so distinguishable as to call for application to one of legal principles not applicable to the other.

It has been shown, we submit, that baseball and the theatre are not so distinguishable; and if more were needed to prove that point it would be found in the fact that the Government in its brief has not stated a single particular in which performances in the legitimate theatre partake of the character of "trade or commerce" more fully than baseball, or a single particular in which there are "non-incidental" interstate activities in the theatre business—or any "interstate commerce" at all which is not attributable to the fact that the

persons involved and their paraphernalia must travel from State to State to give their scheduled performances in different cities.

*Subsequent Congressional Consideration*

In its argument under this heading—and in fact in the heading itself—the Government departs a long way from the emphasis of the *Toolson* opinion. What this Court said (at p. 357) was that "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect". As we read that statement in the light of the history of the subject, the emphasis is on the second part of the sentence and not the first.

For it would not seem that great weight could attach to the "subsequent Congressional consideration" upon which the Government leans so heavily (Br. p. 18)—the investigation* and report** of the Celler Subcomittee on Study of Monopoly Power.

The Celler Committee's report certainly does not meet the test which the Government states in its footnote (Gov. Br. p. 18), of constituting "specific legislative history reflecting clear and unequivocal affirmation of the decision". For the Subcommittee (Report, p. 135) expressed doubt that the *Federal Baseball* case was still good law in 1952.

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*Hearings before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 82nd Cong., 1st Sess., Serial No. 1, Part 6, "Organized Baseball".

**Organized Baseball, Report of the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary Pursuant to H. Res. 95 (82nd Cong., 1st Sess.), p. 135.

pointing out that in the 30 years following that decision there had been important changes both in the operations of organized baseball and in this Court's interpretation of the scope of statutes enacted to regulate interstate commerce; and the conclusions of the report, which opposed legislation that would give organized baseball *complete* immunity from the antitrust laws, included the following (p. 231):

> "There is, however, no need to enact a special rule of reason for baseball unless such a rule is not already applicable to this industry. Organized baseball, represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested by the rule of reason. Though lawsuits have been filed against organized baseball in recent years, in none of them has the court yet passed on the reasonableness of the reserve clause. The Department of Justice has not disputed baseball's position that the reserve clause is legal under the rule of reason.
>
> "It would therefore seem premature to enact general legislation for baseball at this time. Legislation is not necessary until the reasonableness of the reserve rules has been tested by the courts. * * *"

The reasoning by which the Government reaches the conclusion—if that, indeed, is its conclusion—that Congress somehow approved or ratified the *Federal Baseball* decision escapes us. For we are unable to understand how such approval or ratification can result from a finding that the *Federal Baseball* case had probably ceased to be the law, and that Congress should *not* consider whether to restore the rule of that case *partially*, until the federal courts—in antitrust proceedings of which they would not have juris-

diction if the *Federal Baseball* case were good law—had thrown further light on the subject.*

With respect to the second part of the sentence quoted from the *Toolson* opinion—to the effect that Congress has not seen fit to bring baseball under the antitrust laws—it seems that the Court gave weight to that factor in spite of what was said in *Girouard* v. *United States, supra* at 69, and *Helvering* v. *Hallock,* 309 U. S. 106, at 119. For baseball (and the same is true of the theatre) is a medium of public entertainment and is the subject of wide public interest; and in the case of such a business it may fairly be inferred that the failure of Congress to amend the statute was not due to ignorance of its interpretation.

It would appear to be within the bounds of propriety for this Court to notice judicially that public interest in baseball extends throughout the body politic, from the lowliest to the most exalted—into the halls of our deliberative assemblies and, by common report, the higher realms of the judiciary. It would seem equally within the bounds of propriety for this Court to notice judicially that the legitimate theatre is also the subject of wide public interest.

*Reliance on this Court's Prior Decision*

The Government makes the flat statement (Br. p. 19) that:

> "Professional baseball, in its development since 1922, could and did rely on the flat holding in the *Federal Baseball* case that it was not subject to the antitrust laws."

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*We note also that the *Toolson* case and its two companion cases (*Kowalski* and *Corbett*, cited *supra*) had been decided by the District Courts before the Celler Subcommittee commenced its hearings on July 30, 1951.

and at pp. 11 and 25, it talks about "baseball's reliance" and "baseball's development in reliance" on the *Federal Baseball* case, as if it were dealing with a matter on which this Court had made a finding of fact.

It may well be that the baseball industry did rely on the *Federal Baseball* case and mold its development on the conscious assumption that the federal antitrust laws did not apply to it—though it is difficult to see how such reliance could be proved, even if testimony on the matter could properly be taken for the purpose of determining whether *stare decisis* should apply.

But this Court did not say that baseball *had* developed for 30 years in reliance on the *Federal Baseball* case. What the Court did say (346 U. S. at 357), after pointing out that Congress had not taken steps to repeal the *Federal Baseball* ruling by legislation, was that:

> "The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."

In other words, baseball was *left to develop* on that understanding; and that is certainly the fact. It is equally the fact that the theatrical business—at least from the time of the second decision in the *Hart* litigation—was *left to develop* upon the understanding that its status under the Sherman Act was the same as baseball's; and the subsequent cases, cited above, show that the lower courts shared that understanding.

It is submitted that the Government's three "distinctions" do not distinguish, and that the case for *stare decisis* is as strong here as it was in *Toolson*, independently of the weight that must be given to the *Toolson* case itself; and

that, with the Toolson decision in the books, the case for *stare decisis* is compelling.

Speaking of the evils that result from overruling earlier considered decisions, Mr. Justice Roberts, joined in dissent by Mr. Justice Frankfurter, said in *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 113, that apart from the difficulties resulting to lower courts, litigants and counsel,

> "* * * the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy. * * *."

We submit that neither the Bar nor the public would understand a refusal by this Court to follow the *Toolson* case upon the basis of any of the distinctions which the Government has made or suggested in its brief. The *Toolson* case would become a "sport in the law" (see *Screws* v. *United States, supra* at 112)—"a restricted railroad ticket, good for this day and train only" (see *Smith* v. *Allwright*, 321 U. S. 649, 669)—and good only for the interests who control the professional baseball leagues.

*Stare decisis* enables the Court to approach the ideal of equality before the law and to achieve a uniform application of the law to litigants, whatever their status. "There will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."* By the same token, there will be no equal justice under law if what is *stare decisis* in 1953 is not *stare decisis* in 1954, or if a rule of law, which for over 40 years has always been held applicable equally to X and Y, is now held to be *stare decisis* for X, but not *stare decisis* for Y.

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*Douglas, *Stare Decisis*, 49 Col. L. Rev. 735, 736 (1949).

## CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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September 23, 1954